10

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS
CLERK

No. 80-2116

In the Supreme Court of the United States

October Term, 1981

WILLIAM ARCHIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

NICKOLAS P. CHILIVIS
(Counsel of Record)
GARY G. GRINDLER
DAVID J. LLEWELLYN
POWELL, GOLDSTEIN, FRAZER & MURPHY
1100 C&S National Bank Building
35 Broad Street, N. W.
Atlanta, Georgia 30335
404/572-6600
Attorneys for Petitioner
William Archie Williams

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Table of Contents I

Table of Authorities II

Argument 1

I. Introduction 1

II. Counts II and III Each Allege Only That Petitioner Deposited a Single Check for Collection Which Does Not Rise to the Level of a Loan or Credit Transaction and Does Not Constitute a Willful Overvaluation of a Security 4

A. The Deposit of a Check for Collection Does Not Rise to the Level of a Loan or Credit Transaction 4

B. An Uncollected Check upon Which a Bank Extends Credit Becomes an Enforceable Obligation Which Cannot Be Viewed as "Overvalued", nor as a "False Statement" 6

C. Counts II and III in This Case Do Not Allege That Petitioner Engaged in "Check Kiting" nor Do They Allege a "False Statement" 8

III. The Rule of Lenity Should Be Applied to §1014 14

IV. "Security" as Used in §1014 May Not Be Defined by Reference to Other Code Sections 16

V. Failure to Require the Jury to Find Intent to Defraud Will Allow Prosecution under §1014 Without Proof of an Essential Element of the Underlying Offense of "Check Kiting" 18

VI. Conclusion 20

TABLE OF AUTHORITIES

Cases

Bell v. United States, 349 U.S. 81 (1955) 16
Ciullo v. United States, 325 F.2d 227 (D.C. Cir. 1963) 18
Dunn v. United States, 284 U.S. 390 (1932) 11
Erlenbaugh v. United States, 409 U.S. 239 (1972) 17
Ex Parte Bain, 121 U.S. 1 (1887) 9, 11, 12, 13
Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969) 12
Rewis v. United States, 401 U.S. 808 (1971) 16
Russell v. United States, 369 U.S. 749 (1962) 9, 11, 13
Stirone v. United States, 361 U.S. 212 (1960) 12, 13
United States v. Bass, 404 U.S. 336 (1971) 15, 17
United States v. Calandrella, 605 F.2d 236 (6th Cir.), *cert. denied*, 444 U.S. 991 (1979) 6, 7
United States v. Carll, 105 U.S. 611 (1882) 11
United States v. Christo, 614 F.2d 486 (5th Cir. 1980) 3
United States v. Culbert, 435 U.S. 371 (1978) 14
United States v. Edwards, 455 F. Supp. 1354 (M.D. Penn. 1978) 8, 16
United States v. Enmons, 410 U.S. 396 (1973) 15, 17
United States v. Foshee, 578 F.2d 629 (5th Cir. 1978) 11, 18
United States v. Fulcher, 626 F.2d 985 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 839 (1980) 11
United States v. Gordon, 253 F.2d 177 (7th Cir. 1958) 11, 13
United States v. Hess, 124 U.S. 483 (1888) 11
United States v. Huff, 512 F.2d 66 (5th Cir. 1975) 11
United States v. Pavlick, 507 F. Supp. 359 (M.D. Penn. 1980) 6, 8, 12-13, 14, 16

United States v. Payne, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980) 9-10, 18, 19
United States v. Roberts, 465 F.2d 1373 (6th Cir. 1972) 11
United States v. Sher, 505 F. Supp. 858, *aff'd*, 657 F.2d 28, rehearing denied, 661 F.2d 34, petition for cert. pending, No. 81-1047 16
United States v. Stoddart, 574 F.2d 1050 (10th Cir. 1978) 5, 6
United States v. Turkette, 69 L.Ed.2d 246 (1981) 14
United States v. Williams, 639 F.2d 1311 (5th Cir. 1981) 1
United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) 17

STATUTES AND RULES

FEDERAL STATUTES

18 U.S.C. §1014 (1970) ..... *passim*
18 U.S.C. §1341 (1970) 14, 18
18 U.S.C. §1951 (1948) 14
18 U.S.C. §1961 (1970) 14
Ch. 273, 42 Stat. 820 (1922) 18

STATE STATUTES

D.C. Code Ann. §22-1410 (1973) 18
La. Rev. Stat. Ann. §10:3-409(1) (1975) 7
La. Rev. Stat. Ann. §10:3-104(2)(c) (1975) 7
La. Rev. Stat. Ann. §10:4-401(1) (1975) 3
La. Rev. Stat. Ann. §10:3-411 (1975) 7
La. Rev. Stat. Ann. §10:3-411(1) (1975) 7
La. Rev. Stat. Ann. §10:3-413(2) (1975) 5, 7, 8, 16, 19

LAW REVIEW ARTICLES AND OTHER CITATIONS

38 Mo. L. Rev. 432 (1973) 18
44 Harv. L. Rev. 451 (1931) 18
U.C.C. §3-104 7
Whitney, *Law of Modern Commercial Practice*, §341 (1965) 19
White and Summers, *Uniform Commercial Code*, §13-8 (2d ed. 1980) 7

REPLY BRIEF FOR PETITIONER

ARGUMENT

I

INTRODUCTION

The government focuses throughout its brief almost exclusively on the question whether "check kiting" falls within the scope of 18 U.S.C. §1014. In so doing, the government's brief goes far beyond the specific allegations of Counts II and III of the indictment at issue, goes far beyond the record of this case and glosses over the clear language of §1014 in a veiled effort to limit its analysis to generalizations about §1014 and about "check kiting" as those words are defined by the government. While this case in part presents petitioner's contention that §1014 cannot be utilized to prosecute "check kiting", the words "check kiting" are used simply because the courts below and the government have attempted throughout this case to *label* the actions of petitioner as "check kiting". (J.A. 21, 27, 36); *United States v. Williams*, 639 F.2d 1311, 1319 (5th Cir. 1981). (A. 20). The issues presented by this case, however, require this Court to look closely at the specific allegations of Counts II and III and the evidence as presented by the record.

The overall question is whether the allegations of Counts II and III are subject to prosecution under §1014 *regardless of how they are labeled.* Labels do not change what is alleged by Counts II and III. The government by labeling petitioner's actions as "check kiting" has made assumptions unsupported by the record and has improperly discussed this case as if the allegations were broader in scope than those actually made.[1]

1. Insofar as the government's labels indicate something more than was what was alleged by Counts II and III, petitioner was not given sufficient notice of the charges which is fatal to this prosecution. See pp. 8-14, *infra.* (See government's argument at p. 40 of its brief)

Count II as returned by the federal grand jury deals with only one check. (J.A. 3). Count III as returned by the federal grand jury deals with only one check. (J.A. 3-4). Nevertheless, without reference to the record or the indictment, the government speaks in terms of "a series" of checks (Gov. Br. 10, 12, 21), a "systematic writing and depositing of checks" (Gov. Br. 18) and a "check kiting scheme". (Gov Br. 10, 12-13, 14-15, 19, 21, 27, 32, 40). The indictment says nothing of any of these.

Moreover, Counts II and III of the indictment do not allege, as the government would have this Court believe (Gov. Br. 18-21), that petitioner made a "false statement". (J.A. 3-4). Counts II and III allege *only* that petitioner "overvalued a security, that is a check. . . ." *Id.* The alleged "overvalu[ation] of a security, that is a check . . ." is purported *only* to have resulted from an alleged representation to the bank at which each respective check was deposited "that said check was of a value equal to the face amount of the check, when in truth and fact, as the defendant then well knew, there were no sufficient funds" in the defendant's account at the drawee bank. (J.A. 3-4). Counts II and III of the indictment allege no more, no less.[2]

The government agrees that petitioner made no oral or written statements or representations at the time the only two checks at issue were deposited, and argues that the checks themselves constitute "false statements" within the meaning of §1014. (Gov. Br. 18, n.8).

There is no evidence in the record of what the bank officers at the depository banks expect when they receive a check for collection or what their "common understanding" is when checks are presented for deposit. (Tr. 4-37, 51-71,

---

2. In the government's Statement, it discusses a transaction with the Sabine State Bank. (Gov. Br. 6). Nothing was alleged in the indictment with respect to the Sabine State Bank or any checks drawn upon that bank. (J.A. 3-4).

74-82). The government improperly attempts to fill in these evidentiary deficiencies by its unrestrained use of *ipse dixits* regarding what the government attorneys perceive are the realities of the banking world. (See, e.g., Gov. Br. 12-15, 19, n.9, 20, 21, 23). For example, without any citation to the record, the government concludes that "a banker who realized that the drawer had no funds on deposit would not credit the check to the drawer's account or reduce it to cash." (Gov. Br. 19).[3] This is not only wholly unsupported in the record, it is a misstatement of banking practices. A banker can legally credit an uncollected check to a drawer's account or reduce it to cash, and we submit this is a common banking practice. The government, without support from the record, also improperly states that petitioner's argument "is contrary to the common understanding of the hundreds of thousands of persons who each day accept checks" . . . and, again without citation to the record, attempts to assert what a check is "[i]n common usage."[4] (Gov. Br. 20). Incredibly, the government also has attempted to present what purports to be statistical evidence of what some unknown person has decided are "check kiting" schemes in this country by making rank hearsay statements about the Federal Deposit Insurance Corporation which are not of record and which are highly improper. (Gov. Br. 13-14, n.7). These assertions should be stricken from the government's brief.

---

3. This, of course, totally disregards the fact that a bank has an absolute right to pay an uncollected check and also to allow overdrafting. La. Rev. Stat. Ann. §10:4-401(1) (1975) provides in relevant part:

> "As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft."

See also *United States v. Christo*, 614 F.2d 486, 493 (5th Cir. 1980).

4. The government fails to discuss the "common usage" of a certified check, or the "common understanding" of the difference between it and an ordinary check.

The government strongly relies upon its assumption that "check kiting," as defined by the government, was alleged, proven and found by the jury in this case. Contrary to the government's argument that "check kiting" was sufficiently alleged (Gov. Br. 40), Counts II and III each charge only the deposit of one check. (J.A. 3-4). Thus, the appropriate inquiry by this Court is whether a single bad check deposited for collection can, by itself, support a prosecution under §1014.

II

Counts II and III Each Allege Only That Petitioner Deposited a Single Check for Collection Which Does Not Rise to the Level of a Loan or Credit Transaction and Does Not Constitute a Willful Overvaluation of a Security

The charges against petitioner are limited by the indictment. Counts II and III of the indictment allege no more than the deposit of a check for collection. Since the government's position is limited by the indictment and the proof, it cannot properly make quantum leaps from its label of "check kiting" to assumptions as to what was charged by the grand jury and what was proven at trial. Contrary to the government's argument (Gov. Br. 40-41), the deposit of a check for collection, as alleged by Counts II and III, simply does not reasonably describe "a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two banks."

A. The Deposit of a Check for Collection Does Not Rise to the Level of a Loan or Credit Transaction.

As argued in petitioner's initial brief, and as the government apparently does not seriously dispute (Gov. Br. 28-34), 18 U.S.C. §1014 focuses upon loan and credit trans-

actions. (Pet. Br. 14-24). To reemphasize (as the government concedes [Gov. Br. p. 18, n.8]), the petitioner made no oral or written representations when the two checks at issue were presented for deposit. (J.A. 7-10, 12-17, 28, Tr. 36). The government thus takes the position that the mere presentation of the check for deposit can constitute a violation of §1014. (Gov. Br. 18, n.8) The government also concedes that "if a worthless check is submitted to the bank for reasons other than to obtain an extension of credit, the conduct is simply not check kiting in the ordinary sense of the term, and would not fall within the prohibition of §1014." (Gov. Br. 28). Therefore, if the mere deposit of a check does not, as petitioner contends, rise to the level of a loan or credit transaction, this case should be reversed.

There is no factual support for the conclusion by the government that the checks at issue were deposited for the purpose of obtaining an immediate extension of credit. When a check is deposited for collection it cannot be inferred from that act alone that the person making the deposit is requesting an extension of credit. La. Rev. Stat. Ann. §10:3-413(2) (1975). A bank which unilaterally decides to extend credit on a check deposited for collection does not by that act elevate the mere deposit of a check to the status of a request by the depositor for credit. Therefore, the cases relied upon by the government to argue that an extension of funds on an uncollected check is a loan or advance are inapposite. (Gov. Br. 27).

The government also cites *United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978), in support of its argument that the check deposits in this case were for purposes of influencing the action of a bank upon an advance, commitment or loan. (Gov. Br. 27). However, the facts of that case clearly point out the distinction between a mere deposit of a check for collection and a purported deposit of a

check whereby the depositor actually requests immediate credit. In *Stoddart,* the defendant telephoned a bank official at a bank where the defendant had an account and falsely represented orally that a $1,500 deposit had been made in another branch of the bank and had not been credited to his account. *Id.* at 1052. The defendant further represented that he had written a check in reliance upon that deposit which had been dishonored by the bank because of insufficient funds. The defendant in *Stoddart* was attempting to convince the bank to give him credit on a check, a check which had not been deposited. *Id.*

In the case at issue, the only allegations and evidence presented by the government are the deposit of two checks in two separate and separately charged transactions, with no further representations, written or oral, by the defendant and no request for credit. We submit that the mere deposit of a check is not a credit or loan transaction under §1014. *United States v. Pavlick,* 507 F. Supp. 359, 362-364 (M.D. Penn. 1980).

B. An Uncollected Check upon Which a Bank Extends Credit Becomes an Enforceable Obligation Which Cannot Be Viewed as "Overvalued", nor As a "False Statement".

As discussed above, Counts II and III allege a violation of §1014 *only* in that petitioner "overvalued a security, that is a check." The government fails to address directly the question whether a check deposited for collection can be "overvalued", but rather relies primarily on its own unsupported conclusion that a check deposited for collection is "worthless or nearly worthless". (Gov. Br. 21). The government's only apparent argument with respect to willful overvaluation of a check is that it is the same as "worthless securities that are presented as collateral for a loan." (Gov. Br. 22), citing *United States v. Calandrella,* 605 F.2d 236 (6th Cir.), *cert. denied,* 444 U.S. 991 (1979).

Calandrella involved the use certificates of deposit which at no time were backed by sufficient funds to cover the face value of the certificate of deposit. *Id.* at 240. There is a significant difference between what a certificate of deposit represents and what an ordinary check represents.

Under the Uniform Commercial Code a "certificate of deposit" . . . "is an acknowledgement by a bank of receipt of money with an engagement to repay it. . . ." U.C.C. §3-104; La. Rev. Stat. Ann. §10:3-104(2)(c) (1975). In contrast, the representations embodied by a check are no more than a promise by the drawer to pay the sum stated on the check upon notice of dishonor. La. Rev. Stat. Ann. §10:3-413(2) (1975). The collecting bank in the case of the check has no cause of action against the drawee bank on the instrument and has no right to money contained in said bank even if sufficient funds are present in the drawer's account. J. White & R. Summers, *Uniform Commercial Code*, §13-8 at 500 (2d ed. 1980). This is made abundantly clear by the fact that a check does not operate as an assignment of funds. La. Rev. Stat. Ann. §10:3-409(1) (1975). The relationship between the collecting bank and the drawee bank is not affected by a decision to credit a check prior to collection.

A comparison between a check and a certified check also points out the clear difference in the representations embodied by these two instruments. In the case of a certified check, the bank has certified that an amount is actually being held in the drawee bank and the drawee bank is liable to the holder of a check since certification constitutes a special type of acceptance. La. Rev. Stat. Ann. §10:3-411 (1975). In fact, if a check is certified, the drawer is discharged. La. Rev. Stat. Ann. §10:3-411(1) (1975).

The promise embodied by the check is that the drawer will pay the amount on the face of the check upon notice of dishonor. Such a promise can not be fraudulent unless

made with an intent not to honor the promise. (Pet. Br. 39). Petitioner in this case honored the checks, as promised. (J.A. 16-17, 21, 31-35; Tr. 35-36). The government simply has not made a credible argument to support its conclusion that there has been a willful overvaluation of a check. *See United States v. Edwards,* 455 F. Supp. 1354 (M.D. Penn. 1978). Moreover, assuming *arguendo* that the government was not required to allege a "false statement" (notwithstanding the disjunctive language of the statute), the argument that the deposit of a check is not a "false statement" rests upon the same rationale as petitioner's contention that there has been no willful overvaluation of a check. *United States v. Pavlick,* 507 F. Supp. 359, 361 (M.D. Penn. 1980). See pp. 8-14, *infra.*

Since there were no written or oral statements or representations made by petitioner at the time of deposit (J.A. 7-10, 12-17, 28; Tr. 35-36), the only representations which were made are embodied by the contract. La. Rev. Stat. Ann. §10:3-413(2) (1975).

The government apparently argues that notwithstanding the above, its unsupported perception of "common understandings" somehow modifies the contract embodied by an ordinary check (Gov. Br. 19-20, n.9) and that it is not obliged to prove or even allege this so-called common understanding. The government's suggestion that representations made to the bank exceed the representations defined by statute, without proof beyond the mere deposit of the check for collection, is simply devoid of factual support. La. Rev. Stat. Ann. §10:3-413(2) (1975).

C. Counts II and III in This Case Do Not Allege That Petitioner Engaged in "Check Kiting" nor Do They Allege a "False Statement".

Assuming *arguendo* that §1014 covers the offense of "check kiting" as it is defined by the government, it is

clear, contrary to the government's argument (Gov. Br. 40-41), that Counts II and III have not charged such a violation. (J.A. 3-4).[5]

The sufficiency of an indictment must be measured by two criteria. The first is whether the indictment contains all of the elements of the offense "charged" and sufficiently apprises the defendant of the charges he is required to defend. The second is whether or not the indictment as drawn is sufficient to permit the defendant to plea his acquittal or conviction in bar to another prosecution for similar conduct. *Russell v. United States*, 369 U.S. 749, 761, 763-764 (1962). If the allegations are not sufficiently asserted in the indictment itself, they cannot be added during the trial by the court or the prosecutor because the Fifth Amendment requires that federal felony indictments be those of a grand jury itself. *Id.; Ex Parte Bain*, 121 U.S. 1 (1887).

In contending that the charges are sufficient, the government argues that the indictment "clearly outlines the underlying facts that constitute check kiting." (Gov. Br. 40). The allegations of the indictment and the government's own stated definition of "check kiting" however belie these assertions. (J.A. 3-4).

The government defines "check kiting" as "a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two banks." (Gov. Br. 40-41). It also asserts that "a check kiting scheme involves the systematic writing and depositing of checks for which there are insufficient funds. . ." (Gov. Br. 18). The Fifth Circuit Court of Appeals in *United States v.*

---

5. The government suggests that petitioner asserted that the indictment was sufficient under §1014. (Gov. Br. 40). This statement is simply untrue. Petitioner has clearly argued his right to challenge the sufficiency of the indictment. (Pet. Br. 13, n.5).

Payne, 602 F.2d 1215, 1219 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980), defined "check kiting" as "involv[ing] a series of facts which taken together constitute a scheme, a studied device, false pretenses built upon a series of false representations designed to lull the bank involved into a feeling of confidence and security. . . . In short, check kiting . . . was a device for fraudulently obtaining credit sufficiently in the nature of an advance or a loan. . . ." The indictment (Counts II & III) neither alleges nor even remotely describes "check kiting". Counts II & III do not use the words "check kiting", do not allege a scheme and do not allege fraud. (J.A. 3-4). They do not allege the "systematic writing and depositing of checks" nor do they allege the use of a "series" of checks. Rather, as discussed in detail in the introduction, Counts II & III each deal with only one check. (J.A. 3-4).

There is a significant difference between "check kiting" and the mere deposit of one check. The government argues that the jury could find a violation of §1014 only if it concluded that petitioner had undertaken a "series of false representations designed to give [himself] time and credit." (Gov. Br. 28, n.18). The obvious significance of proof of a "series" of transactions as a prerequisite to a finding of guilt (assuming *arguendo* falsity) under §1014 demonstrates that Counts II & III failed to allege the essential elements and facts for a violation grounded upon "check kiting".

Therefore, since "check kiting", according to the government and *Payne*, requires the deposit of multiple checks and a "series of false representations," tracking the language of §1014 alone is insufficient.

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly *without any uncertainty* or *ambiguity*, set

forth all the elements necessary to constitute the offense intended to be punished. . ." *United States v. Carll*, 105 U.S. 611 (1882) (emphasis added). *See also Russell v. United States*, 369 U.S. 749 (1962); *United States v. Hess*, 124 U.S. 483, 486-487 (1888).

Section 1014 nowhere specifies that "check kiting" is an offense thereunder. *United States v. Foshee*, 578 F.2d 629, 631, n.3 (5th Cir. 1978). Thus, the language of the statute alone is insufficiently precise for an indictment, and "check kiting" may not Constitutionally be proved as an offense pursuant to an indictment cast in such language of Counts II and III. (J.A. 3-4).

The government may not seek to correct this insufficiency by looking to the other counts. The government must allege all essential elements of an offense in each separate count, since each count stands alone. *Dunn v. United States*, 284 U.S. 390, 393 (1932). It may not look to other counts in an indictment to give life to an otherwise insufficient allegation of a separate substantive offense unless those counts are expressly incorporated in the count in question. *United States v. Huff*, 512 F.2d 66, 69 (5th Cir. 1975). *See also United States v. Gordon*, 253 F.2d 177 (7th Cir. 1958); *United States v. Fulcher*, 626 F.2d 985 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 839 (1980); *United States v. Roberts*, 465 F.2d 1373 (6th Cir. 1972). Therefore, the government may not look to the fact that a single check has been alleged in Counts II and III, neither of which incorporates the other, and contend that it has properly alleged the series of transactions necessary to constitute "check kiting."

The insufficiency of an indictment also may not be corrected by the action of the prosecution or the court. *See Ex Parte Bain, supra.* Thus, the fact that the government and the lower courts in this case went beyond the

facts alleged by the grand jury and informed the jury that the government had actually charged the petitioner with "check kiting," does not permit "check kiting" to be punished under the indictment. (J.A. 36-37). The court charged the jury on "check kiting" (J.A. 35-38), when only two separate incidents of willful overvaluation of "a security" had been alleged. (J.A. 3-4). In so doing, the trial court amended the indictment as found by the federal grand jury. "An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them." *Gaither v. United States,* 413 F.2d 1061, 1071 (D.C. Cir. 1969).

This Court in *Ex Parte Bain, supra,* struck down a conviction found on an indictment which had been amended by the trial court to delete one of the persons allegedly deceived by the defendant. Noting the constitutional requirement that the indictment be that which was found by the grand jury, this Court concluded that an amendment of such an indictment deprives the Court of jurisdiction. *Id.* at p. 13. Therefore, the amendment in this case deprived the trial court of jurisdiction of the offenses alleged in Counts II and III and rendered any conviction found thereon void. *Id.* at p. 13.

A fatal amendment is also effected by verbal instructions given to the jury which add allegations to the indictment. *Stirone v. United States,* 361 U.S. 212, 218-219 (1960). Here, as in *Stirone,* the trial court took away petitioner's substantial right by charging the jury on false statements and "check kiting", neither of which was alleged by the indictment.[6] As in *Stirone,* the addition of these

---

6. There are two separate and distinct offenses contemplated by 18 U.S.C. §1014: false statements and willful overvaluation of security. (Gov. Br. 21). Cf. *United States v. Pavlick,* 507 F.

(Continued on following page)

offenses to the plain words of the indictment deprived petitioner of his right to be tried on an indictment found by the grand jury. The Constitutional rights of the petitioner must not be . . . "at the mercy or control of the court or prosecuting attorney" . . . otherwise . . . "the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." *Russell v. United States, supra* at 771. *See also Stirone v. United States,* 361 U.S. 212, 218 (1960); *Ex Parte Bain, supra* at 10, 13.

Finally, the court's amendment of the indictment has had an extremely prejudicial effect upon petitioner that goes well beyond a technical violation of his rights.[7] First, petitioner was not apprised by the indictment that the government would attempt to prove false statements or "check kiting". The extent of harm which this caused to petitioner's preparation of his defense can never be measured. The proof offered at trial is irrelevant since the issue here is "a failure to allege, not a failure to prove." *United States v. Gordon,* 253 F.2d 177, 180 (7th Cir. 1958). Second, since petitioner has been convicted only of the

---

Footnote continued—

Supp. 359, 361 (M.D. Penn. 1980). Despite the government's attempt to characterize it otherwise throughout its brief (Gov. Br. 18-21), the indictment on its face alleges only a "willful overvaluation of a security". (J.A. 3-4). The trial court, however, failed to restrict itself to the allegation of "willful overvaluation of a security". (J.A. 37-38). In addition to instructing the jury on "check kiting", the Court said that one of the essential elements of each of Counts II and III was that petitioner "did knowingly and willfully make false statements of a material fact. . ." (J.A. 37). However, the grand jury did not return an indictment based on this separate part of §1014. Therefore, the court's instruction constitutes an additional fatal amendment of the indictment.

7. The government argues that Count I should not also be reversed if this Court reverses as to Counts II & III. (Gov. Br. 35, n.25). However, the improper injection of "check kiting" at this trial when the grand jury did not indict on "check kiting" mandates a reversal of the conviction as to all three counts.

crimes alleged in Counts II and III, which do not facially describe false statements or "check kiting", he may be charged at a later time with "check kiting" under another statute. *See* e.g. 18 U.S.C. §1341. *See also, United States v. Pavlick, supra* at 365. If petitioner is so prosecuted, he may be unable to plead his convictions on Counts II and III as a bar to such a prosecution despite the fact that the jury was instructed that petitioner was charged with "check kiting". (J.A. 36). Therefore, the possibility that petitioner may be tried twice for the same offense is very great indeed.

III

The Rule of Lenity Should Be Applied to §1014

The government's contention that the "rule of lenity" should not be applied to the interpretation of §1014 and its suggestion that petitioner has begun his analysis with that rule are both patently incorrect. (Gov. Br. 36-38). Petitioner began his analysis with the plain words of the statute itself (Pet. Br. 14), and it is undeniable that the statute itself does not mention checks or "check kiting". The statutory history fails to reveal any intention on the part of Congress to regulate the presentation of checks drawn on insufficient funds. Such an intention would have constituted a substantial alteration of traditional state-federal relationships. (Pet. Br. 24-29).[8] Thus, since neither the statute nor the legislative history show any intention to include the offenses with which petitioner was tried, we invoked the "rule of lenity" as one important factor in the analysis. (Pet. Br. 24-29).

---

8. The legislative history of the statutes (18 U.S.C. §1961, et seq.; 18 U.S.C. §1951) discussed in the cases of *United States v. Turkette*, 69 L.Ed.2d 246 (1981); and *United States v. Culbert*, 435 U.S. 371 (1978), both relied upon by the government, differ significantly from the history of §1014 since with respect to those statutes Congress made clear its intent that areas previously left to the states would be covered. *Id.*

This is not the first time that the government has come before this Court claiming that an ambiguous statute clearly comprehended conduct which the government wished to punish. *United States v. Enmons*, 410 U.S. 396 (1973), is strikingly similar to this case. There the government argued that the definition of "extortion" under the Hobbs Act included the use of force by union members to obtain legitimate wage demands. This Court rejected the claim that the statutory language was clear. "But the language of the statute is hardly as clear as the government would make it out to be." *Id.* at 399. After reviewing the legislative history of the Act and noting that the government waited some 26 years to bring the first indictment under its proposed theory, the Court rejected the government's contentions. Similarly, in the present case it was not until 1978, some thirty years after the initial passage of §1014, that the first appellate case appears dealing with a prosecution for bad checks under §1014. Indeed, no case involving bad checks appears for eight years after the current version of §1014 was passed by Congress. (Pet. Br. 23, n.9).

The correct statement of the law, and the principle which should be followed in this case, was made clear in *United States v. Bass*, 404 U.S. 336 (1971). In *Bass* this Court stated:

> "While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking." *Id.* at 344.

Because the statute in that case was unclear, as was the legislative history, the Court applied the rule of lenity and adopted the narrower reading of the statute involved. *Id.* at 347.

Congress failed to include bad checks in the language of §1014 and there is no evidence that suggests that it contemplated bad checks as loan or credit transactions. (Pet. Br. 13-37). "When Congress has the will it has no difficulty in expressing it . . . ." *Bell v. United States*, 349 U.S. 81, 83 (1955). Therefore, "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Id.* This is especially true when the government's assertion of "falsity" or "willful overvaluation" rests upon unproven "common understandings" which are in complete derogation of statutes which expressly define the contractual representations embodied by a check. La. Rev. Stat. Ann. §10:3-413(2) (1975).

The government's assertion that §1014 unambiguously covers "check kiting" and "bad checks" is simply incorrect. *United States v. Edwards, supra; United States v. Pavlick, supra; United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, 657 F.2d 28 (3rd Cir. 1981), petition for cert. pending, No. 81-1047. (Pet. Br. 24-29). Thus, as in *Rewis v. United States*, 401 U.S. 808 (1971), where neither the statutory language nor legislative history supported the government's wide-ranging interpretation of another statute, neither the language nor history of §1014 supports the government's position here. *Id.* Since that is the case, the Court must strictly construe the statute and resolve this dispute in favor of lenity and in favor of petitioner.

IV

"Security" as Used in §1014 May Not Be Defined by Reference to Other Code Sections

The government's attempt to apply the definition of "security" found in other separate, distinct sections of Title 18 of the United States Code to §1014 (Gov. Br. 24) is

inappropriate. It violates the oft-repeated principle that criminal statutes are to be strictly construed. E.g., *United States v. Enmons*, 410 U.S. 396, 411 (1973). Moreover, it directly contradicts numerous decisions of this Court which have refused to apply the definitions or requirements of one code section to another. For example, in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) (cited by the government in its Brief, p. 15), this Court refused to expand the jurisdiction of the United States courts to a case of manslaughter committed in a place where murder would have been punishable. While admitting that it was extremely improbable "that Congress could have intended to make those differences with respect to place, which their words import", the Court stated that probability was not a guide and that since Congress had not made manslaughter punishable in that place, "this court cannot enlarge the statute." Similarly, in *Erlenbaugh v. United States*, 409 U.S. 239 (1972), the court refused to read an exception into one code section which was provided in another. See also, *United States v. Bass*, 404 U.S. 336, 344 (1971) . . . "no conclusion can be drawn from [one code section] concerning the correct interpretation of [another section]").

Simply because "security" is defined as comprehending checks in one code section does not mean that "security" as used in §1014 comprehends them. Rather, the plain words of §1014 itself, the context in which they are used and the legislative history of the section are the sole criteria used in interpreting the meaning of "security" as used therein. As petitioner has demonstrated (Pet. Br. 29-32), "security" is used in §1014 in the sense of collateral. The checks alleged in Counts II and III to have been overvalued plainly were *not* collateral, nor did Congress ever contemplate that the mere deposit of a check would be a giving of collateral. Therefore, the

government's attempt to apply the definition of "security" in other code sections to §1014 should be rejected.

V

Failure to Require the Jury to Find Intent to Defraud Will Allow Prosecution under §1014 Without Proof of an Essential Element of the Underlying Offense of "Check Kiting"

The government asserts that petitioner's argument against allowing federal prosecution of bad checks and "check kiting" without proof of intent to defraud "seriously misconstrues the question before the court." (Gov. Br. 41). The government misses entirely the significance of this point.

First, "check kiting", under the government's definition, is "a scheme for obtaining credit by depositing a series of worthless checks in accounts maintained at different banks." (Gov. Br. 12). See also *United States v. Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980).

"Check kiting" has been defined by the government, the Fifth Circuit in *Payne*, by the prosecutions for check kiting under 18 U.S.C. §1341, and also by the majority of the state bad check laws *to include the essential element of intent to defraud.* Comment, "Insufficient Funds Checks in the Criminal Area: Elements, Issues and Proposals," 38 Mo. L. Rev. 432 (1973) (see statutes cited therein); Comment on Legislation, "Bad Check Laws," 44 Harv. L. Rev. 451 (1931) (see statutes cited therein); *Ciullo v. United States*, 325 F.2d 227 (D.C. Cir. 1963); Ch. 273, 42 Stat. 820 (1922); D.C. Code Ann. §22-1410 (1973). However, "no federal statute explicitly makes the kiting of checks a crime. . . ." *United States v. Foshee*, 578 F.2d 629, 631, n.3 (5th Cir. 1978). For this Court to conclude that

"check kiting" comes within the reach of §1014 without requiring proof of the essential elements which comprise the offense of "check kiting" or "bad checks" will enable the government, in effect, to obtain a conviction for actions dependent upon an intent to defraud without proving intent to defraud.[9]

Second, this argument also relates to petitioner's contention that Congress in passing §1014 did not intend to expand the jurisdiction of the federal government to "bad checks" or "check kiting". (Pet. Br. 35-37). The government argues incorrectly that petitioner "conceded" that prosecutions under state bad check laws do not rest upon the defendant's breach of a contractual "promise that the check will be paid upon due presentment, but upon the fact that in presenting a bad check the defendant has been guilty of such fraud and misrepresentation as to be punishable as a crime." (Gov. Br. 20). Contrary to this misstatement, petitioner clearly argued that in *Payne* the Fifth Circuit failed to disclose that in *Law of Modern Commercial Practice,* Whitney reached *his* conclusion of what representations were made when a check is deposited by relying upon *state* bad check laws. (Pet. Br. 28). Moreover, without authority or citation, Whitney also concluded incorrectly that in giving a check the drawer "promise[d] to the holder that the check would be paid upon due presentment. . ." Whitney, *Law of Modern Commercial Practice,* §341 (1965). *That simply is not the promise embodied by a check.* La. Rev. Stat. Ann. §10:3-413 (2) (1975). Moreover, the majority of state statutes require proof of intent to defraud under the bad check laws, a significant element which the government glibly argues

---

9. The government contends that under §1014 "whether the defendant carries the misrepresentation to the point of actually defrauding the institution is completely irrelevant." (Gov. Br. 42).

is not necessary for prosecution of "check kiting" under §1014. (Gov. Br. 42).

To fail to require the jury to find intent to defraud will allow the jury in a prosecution under §1014 to find a violation without proof of an essential element of the underlying offense of "check kiting". This Court should find that §1014 does not extend to a charge of "check kiting."

VI

CONCLUSION

For the reasons stated above, petitioner prays that this Court reverse his convictions on Counts II and III and that said counts be dismissed with prejudice. Petitioner further prays, in light of the substantial prejudice from the "check kiting" instructions, that the conviction on Count I be reversed and remanded for a new trial.

Respectfully submitted,

NICKOLAS P. CHILIVIS
GARY G. GRINDLER
DAVID J. LLEWELLYN
Attorneys for Petitioner
William Archie Williams

POWELL, GOLDSTEIN, FRAZER & MURPHY
1100 C&S National Bank Building
35 Broad Street, N. W.
Atlanta, Georgia 30335
(404) 572-6600

CERTIFICATE OF SERVICE

I, NICKOLAS P. CHILIVIS, do hereby certify that I have this day served the within and foregoing Reply Brief for petitioner by mailing three copies thereof in envelopes properly stamped and addressed as follows:

Rex E. Lee, Esquire
Solicitor General
Richard Wilkens, Esquire
Assistant to the Solicitor General
Department of Justice—Suite 5143
9th and Constitution Avenue, N. W.
Washington, D. C. 20530

This 6th day of April, 1982.